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10/615,171REMARKS

The Office Action states that claims 1-15 (Group I) and claims 16-20 (Group II) are drawn to inventions that are independent or distinct and that restriction is proper. In conformance with 37 C.F.R. §1.143, the claims of Group I are provisionally elected and the requirement for restriction in the present application is traversed.

Applicants submit that restriction is never mandatory and is discretionary under 35 U.S.C. §121. In order for a proper restriction requirement to exist, it must be shown that:

- 1) two or more independent inventions are claimed;
- 2) two or more distinct inventions are claimed; and
- 3) a search and examination of an entire application cannot be made without serious burden.

(MPEP §803.01, emphasis added)

In the present case, applicants respectfully submit that the entire application can be searched and examined without serious burden because as claimed, the structural elements set forth, for example, in Group I claim 9 are essentially present in Group II claim 16, and a search of the Group I claims would therefore encompass the Group II claims.

Moreover, applicants submit that a restriction requirement should not be deemed proper simply because different fields of search are not co-extensive. Applicants urge that the different Patent Office classifications set forth in the Office Action and applied to their claims cannot and should not be relied upon as the basis for the restriction requirement. It is a well known fact that prior art in the Patent Office is reclassified on a continuing

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basis. Thus, a given pair of claims might be classified identically one day, only to be classified separately one month later because of a Patent Office reclassification project.

Applicants submit that Congress never intended that the jurisdictional requisite of "independent and distinct" depend on and vary in accordance with Patent Office classification programs. To suggest otherwise would be to suggest that Congress enacted 35 U.S.C. §121 with the intent that the jurisdiction of the Commissioner, in restriction matters, could be enlarged by the Commissioner himself, and this clearly would be improper on constitutional grounds.

Applicants respectfully submit that the restriction requirement should be removed because there is not a valid ground under 35 U.S.C. §121 for exercising the Commissioner's discretion and requiring restriction.

A provisional election of the Group I claims (claims 1-15) is made. However, the restriction requirement is traversed and reconsideration and withdrawal of the requirement is respectfully requested.

Respectfully submitted,

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